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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 32

FIDELITY UNION TRUST COMPANY AND MINTON H. TWINCH, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF EDITH M. PECK, DECEASED, PETITIONERS,

vs.

ETHEL ADELAIDE FIELD

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 16, 1940.

CERTIORARI GRANTED APRIL 22, 1940.

SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 2, 1940.

—8736

IN THE

District Court of the United States,

FOR THE DISTRICT OF NEW JERSEY.

No. E-5723. IN EQUITY.

ETHEL ADELAIDE FIELD,

v.

FIDELITY UNION TRUST COMPANY AND MINTON H. TWINCH, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF EDITH M. PECK, DECEASED, AND UNITED STATES SAVINGS BANK OF NEWARK.

DOCKET ENTRIES.

May 19, 1937.	Bill of Complaint filed.
May 19, 1937.	Subpœna issued.
June 1, 1937.	Subpœna returned, served May 26, filed.
June 9, 1937.	Answer and Cross Bill of United States Savings Bank of Newark, filed.
June 14, 1937.	Answer of Fidelity Union Trust Co. and Minton H. Twinch, &c., filed.
June 21, 1937.	Notice fixing place for Trial filed (Newark).
July 1, 1937.	Interlocutory Decree filed.
July 2, 1937.	$4230.36 Deposited into Registry (U. S. Savings Bank of Newark).
July 2, 1937.	Defendants Costs taxed at $125.00 filed (U. S. Savings Bank of Newark).
July 9, 1937.	$125. mailed to Joseph Kahrs.

Jan. 6, 1938.	$4,063.06 check mailed to Hood, Lafferty & Campbell.
Feb. 3, 1938.	Notice to Reinstate case to Trial calendar, filed.
Feb. 7, 1938.	Hearing on Motion to reinstate case for Trial. To go on trial within one month. (Clark).
Dec. 29, 1938.	Findings of Fact and Conclusions of Law and Judgment for Defendant, and Ordering Clerk to pay out moneys on Deposit, filed.
Mar. 20, 1939.	Notice of Appeal filed (Copy sent to Circuit Court, H. L. & C. & Frances H. Welsh).
Mar. 20, 1939.	Bond on Appeal filed.
Mar. 22, 1939.	Receipt from Circuit Court of Appeals of Notice of Appeal, filed.

BILL OF COMPLAINT.

(Filed May 19, 1937.)

IN THE DISTRICT COURT OF THE UNITED STATES,
FOR THE DISTRICT OF NEW JERSEY.

No. E-5723. IN EQUITY.

Ethel Adelaide Field,

Complainant,

v.

Fidelity Union Trust Company and Minton H. Twinch, as Executors of the Last Will and Testament of Edith M. Peck, Deceased, and United States Savings Bank of Newark,

Defendants.

To the Honorable Judges of the District Court of the United States for the District of New Jersey:

ETHEL ADELAIDE FIELD, the complainant herein, by Russell C. MacFall, Esq., her solicitor, respectfully represents and shows to the Court as follows:

1. The complainant Ethel Adelaide Field is a citizen of the State of New York and United States of America, and a resident of the State of New York, residing at No. 123 East Fifty-third Street, in the Borough of Manhattan, City, County and State of New York.

2. Upon information and belief the defendant Minton H. Twinch is a citizen and resident of the State of New Jersey, and resides at No. 65 South Harrison Street, in the City of East Orange, County of Essex and State of New Jersey.

3. Upon information and belief the defendants Fidelity Union Trust Company and United States Savings Bank of Newark are corporations duly organized and existing under and by virtue of the laws of the State of New Jersey, and are citizens and residents of that state, having their principal offices in the City of Newark, County of Essex and State of New Jersey.

4. This is a suit of a civil nature in equity between citizens of different states, and the amount involved in this controversy, exclusive of interest and costs, exceeds the sum of three thousand dollars.

5. Upon information and belief one Edith M. Peck died on the sixth day of January, 1935, a resident of the County of Essex, State of New Jersey, leaving a last will and testament, and on or about the eighteenth day of January, 1935, the defendants Fidelity Union Trust Company and Minton H. Twinch were duly appointed as the executors of her said last will and testament, duly qualified as such, and ever since have been and still are acting as such executors.

6. Upon information and belief the said Edith M. Peck prior to her death opened and maintained a savings account in her own name with the defendant United States Savings Bank, and on or about the second day of January, 1935 she caused said account to be transferred so that the same stood in the name of Edith M. Peck in trust for Ethel Adelaide Field, and that said account and the balance to the credit thereof remained in such form until and including the time of the death of the said Edith M. Peck.

7. Upon information and belief the said Edith M. Peck transferred said account as aforesaid with the intent and purpose of creating a valid trust of the balance standing to the credit of said account, for the benefit of the complainant herein, and no other or further notice of the existence and terms of a legal and valid trust was given in writing to the said defendant savings bank.

8. Upon information and belief the balance standing to the credit of the said account on January 6, 1935, the date of the death of the said Edith M. Peck was in the approximate sum of $4000; and that said sum, together with accumulations of interest thereon, now remains on deposit with the defendant United States Savings Bank in the said account as aforesaid.

9. By virtue of the provisions of Chapters 40 and 41 of the Public Laws of New Jersey 1932, pages 59 and 60, which were duly passed and became laws of the State of New Jersey in 1932, and which were in full force and effect at the time of the death of the said Edith M. Peck, the trustee named in said savings bank account, the complainant, upon the death of the said trustee as aforesaid, duly succeeded as the beneficiary thereof to all rights in said savings account and became entitled to the balance or sum then standing to the credit of said account as the named beneficiary for whom the said deposit in trust was made.

10. Upon information and belief the passbook representing said trust account is in the possession of the said defendants Fidelity Union Trust Company and Minton H. Twinch, who are the executors of the estate of Edith M. Peck, deceased, and that said defendants have failed and refused to deliver to the complainant the said passbook, and claim a right or title thereto on behalf of the estate of Edith M. Peck.

11. Upon information and belief the defendant United States Savings Bank has failed and refused to pay over the said sum standing to the credit of said account to the complainant unless the said passbook is presented by the complainant to the said defendant, and unless the said defendants Fidelity Union Trust Company and Minton H. Twinch, as executors of the estate of Edith M. Peck, as aforesaid, first consent to such payment.

12. Complainant is the person intended to be designated as beneficiary of said trust account, and is the same person as named as such beneficiary.

13. Complainant has no adequate remedy at law, and therefore prays for equitable relief.

WHEREFORE your complainant prays for equitable relief as follows:

a. That a writ of subpœna in the usual form, directed to the Fidelity Union Trust Company and Minton H. Twinch, as executors of the last will and testament of Edith M. Peck, deceased, and to the United States Savings Bank, the defendants, issue out of the office of the clerk and under the seal of this court, directing said defendants to be and appear before this Honorable Court on a certain date, then and there to make full, true and correct answer to this bill of complaint, but not under oath, answer under oath being expressly waived, and that said defendants be required to stand by, perform and abide by such further orders, directions and decrees that may be made against them in the premises, and that shall seem proper and right in equity and good conscience;

b. That an order may be issued without notice temporarily enjoining and restraining the said defendant United States Savings Bank and its officers, attorneys, employees and agents, from transferring, paying or otherwise disposing of the said balance standing upon its books to the credit of the said savings account hereinabove described, and temporarily enjoining and restraining the said defendants Fidelity Union Trust Company, its officers, attorneys, employees and agents, and Minton H. Twinch, as executors of the estate of Edith M. Peck, deceased, from transferring or otherwise disposing of the passbook of said savings bank account and collecting the proceeds thereof, until the further order of this Court; and that said defendants in and by said order be directed to show cause why said injunction should not be made permanent, and why such other and further relief in the premises as may be just and equitable should not be granted.

c. That this Honorable Court shall order and decree that the said defendants Fidelity Union Trust Company and Minton H. Twinch, as executors as aforesaid, shall surrender and deliver to the complainant the said passbook of the savings account with the United States Saving Bank standing in the name of Edith M. Peck in trust for Ethel Adelaide Field.

d. That this Honorable Court shall order and decree that the balance standing to the credit of said savings bank account is the property of the complainant, and that the said defendant United States Savings Bank be ordered and directed to pay over to the complainant the said balance of said account, together with all accumulations thereto to the date of such payment, upon the surrender and delivery to it of the said passbook; and that it shall be further ordered and decreed that the defendants Fidelity Union Trust Company and Minton H. Twinch, as executors of the estate of Edith M. Peck, deceased, have no right of property or interest in said savings account or in the balance standing to the credit thereof.

e. That the complainant have such other, further and adequate relief in the premises as equity and the nature of the circumstances of the case may require, and as this Honorable Court shall deem just, proper and equitable.

ETHEL ADELAIDE FIELD.
Complainant.

RUSSELL C. MACFALL,
Solicitor for Complainant.
31 East Ridgewood Avenue,
Ridgewood, N. J.

STATE OF NEW YORK,
COUNTY OF NEW YORK, } *ss.:*

ETHEL ADELAIDE FIELD, being first duly sworn, deposes and says that she is the complainant named in the foregoing bill of complaint; that she has read and subscribed to the said bill of complaint, and that the allegations and statements set forth therein are true, except as to those stated upon information and belief, and as to such she is informed and believes they are true.

ETHEL ADELAIDE FIELD.

Subscribed in my presence and sworn to before me this fourteenth day of May, 1937.

J. E. MUNIZ, JR.,
(Seal) *Notary Public.*

Queens Co. Clerk No. 2304.
Filed in N. Y. Co. Clerk No. 989. Register 9M596.
Term expires March 30, 1939.

ANSWER OF DEFENDANTS FIDELITY UNION TRUST COMPANY AND MINTON H. TWINCH, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF EDITH M. PECK, DECEASED.

(Filed June 14, 1937.)

Answer of the defendants Fidelity Union Trust Company and Minton H. Twinch, as executors of the last will and testament of Edith M. Peck, deceased.

The defendants, Fidelity Union Trust Company and Minton H. Twinch, as executors of the last will and testament of Edith M. Peck, deceased, answering the bill of complaint say that:

1. Paragraphs 1, 2, 3, 4, 5 and 6 are admitted.

2. Answering the statements contained in paragraph 7, these defendants deny that a valid trust was created by the transfer alleged therein.

3. Paragraph 8 is admitted.

4. Answering the statements contained in paragraph 9, these defendants deny that the said complainant upon the the death of the said Edith M. Peck or at any other time succeeded as beneficiary to the rights in said savings account or became entitled to the sum then outstanding in said account either by virtue of the statutes cited in said paragraph or otherwise by operation of law.

5. Paragraph 10 is admitted. These defendants further say that the entire legal and equitable title to said passbook is vested in these defendants in their capacity as executors under the last will and testament of Edith M. Peck, deceased.

6. Paragraph 11 is admitted.

7. Answering the statements contained in paragraph 12, these defendants admit the identity of the person named

in the account in the United States Savings Bank of Newark, but deny that the complainant has any legal or equitable interest therein as beneficiary or otherwise.

8. Further answering the bill of complaint, these defendants say that the said Edith M. Peck prior to her death opened and maintained a savings account in her name in the United States Savings Bank of Newark. On or about the first or second day of January 1935, and shortly prior to her death, she expressed the desire that she, the said Edith M. Peck, should, during the remainder of her lifetime, continue to retain exclusive control over said account with the sole right of withdrawal therefrom, redesignation thereof, and right of revocation of any previous disposition, and that no one else should have any right during her lifetime whatsoever with respect thereto, but that she desired upon her death that the balance of the same then remaining in her account should be payable to the complainant. Accordingly, on or about the second day of January 1935, she caused said account to be transferred upon the records of the United States Savings Bank of Newark so that the designation of the account appeared as follows: "Edith M. Peck in trust for Ethel Adelaide Field." The said Edith M. Peck did not at that time nor did she at any time thereafter notify the complainant that the account had been so designated by her, nor did she at any time thereafter perform or cause to be performed any other act in connection with said account prior to the date of her death. She made no subsequent additions thereto or withdrawals thereof, and she at all times kept the passbook in her possession to the end that she alone should have exclusive right to receive the benefit of said account, to withdraw same or any part thereof; and to make a further change of designation if she should so desire; nor did the complainant at any time sign a signature card in reference to said account nor did she at any time have any right to make any withdrawals therefrom or other disposition thereof.

WHEREFORE, these defendants say that no gift inter vivos to the complainant was thereby established and also that no valid trust was created nor any valid gift thereof was made, since the intent, if any, to transmit title to the fund on deposit only upon the death of the donor was in effect a testamentary gift and invalid because not made in accordance with the requirements of the statutes of wills in the State of New Jersey. These defendants further say that upon the death of the said Edith M. Peck, title to said passbook and the funds then on deposit in the United States Savings Bank of Newark passed to and are vested in them absolutely as executors of her last will and testament and are distributable pursuant to the terms thereof and that neither the complainant nor any other person or party has any legal or equitable interest therein.

These defendants reserve the right at or before the final hearing of this cause to apply for an order to strike out the bill of complaint on the ground that it does not set forth establishment of a valid trust of said fund on deposit nor any valid gift thereof and is otherwise vague, irrelevant, uncertain, and does not set forth a cause of action.

HOOD, LAFFERTY & CAMPBELL,
FRANCIS F. WELSH,
Solicitors for Defendants Fidelity Union Trust Company and Minton H. Twinch, as Executors of the Last Will and Testament of Edith M. Peck, Deceased.

PROCEEDINGS AT HEARING.

IN THE DISTRICT COURT OF THE UNITED STATES,
FOR THE DISTRICT OF NEW JERSEY.

Ethel Adelaide Field,
Plaintiff,

v.

Fidelity Union Trust Company and Minton H. Twinch as Executors of the Last Will and Testament of Edith M. Peck, Deceased, and United States Savings Bank of Newark,
Defendants.

Appearances:

RUSSELL C. MACFALL, ESQ., for the plaintiff;

FRANCIS F. WELSH, ESQ., for the defendant Minton H. Twinch;

MESSRS. HOOD, LAFFERTY & CAMPBELL, by MR. WALLACE R. CHANDLER, JR., for the defendant Fidelity Union Trust Company.

Before HON. WILLIAM CLARK, *Judge,* at the Post Office Building, Newark, N. J., on Monday, April 25, 1938, at 10:30 A. M.

THE COURT: Is this case ready, gentlemen?

MR. MACFALL: Yes, your Honor.

THE COURT: Have you any witnesses?

MR. MACFALL: Yes, we have.

THE COURT: Will you call them, then; I thought you didn't have the other day; I thought you said it was going to be a stipulated case.

MR. MACFALL: We weren't able to stipulate on the facts; the witnesses are more or less a formality. The essential facts are admitted by the answer.

THE COURT: Then call such witnesses as you have.

ETHEL A. FIELD, called and sworn on behalf of the plaintiff, testified as follows:

DIRECT EXAMINATION.

By MR. MACFALL:

Q. Where do you live, Mrs. Field?

A. 123 East Fifty-third Street, New York City.

Q. And you are a resident and citizen of the State of New York?

A. I am.

Q. Did you know Edith M. Peck?

A. I did.

Q. Miss Peck was a resident of——

A. Of Newark, New Jersey.

Q. Were you related to Miss Peck?

A. Not at all.

Q. And how long did you know her?

A. I should say twelve or fifteen years.

Q. This case is a claim for a savings bank account which was opened by Miss Peck in trust for you as beneficiary. Did you know anything about that account prior to Miss Peck's death?

A. I did not.

Q. Do you know the date of her death?

A. I think it was January 6, 1935.

Q. That is all.

(No cross-examination.)

FRANK E. LOTT, called and sworn on behalf of the plaintiff, testified as follows:

DIRECT EXAMINATION.

By MR. MACFALL:

Q. Where do you live, Mr. Lott?

A. Nutley, New Jersey.

Q. You are employed by the Fidelity Union Trust Company, are you not?

A. That's right.

Q. In what capacity?

A. Assistant trust officer.

Q. Did you know the decedent, Edith M. Peck, late of Newark?

A. Yes.

Q. And did you act on behalf of the bank in a fiduciary relationship for the decedent?

A. Yes, we had a custodian account for her.

Q. Did you have occasion to see Miss Peck prior to the time of her death?

A. Yes, quite often.

Q. Can you recall the date?

A. Well, I used to see Miss Peck quite a bit when she was in her last illness. However, my records indicate that I saw her about December the 23d.

Q. Of 1934?

A. Yes.

Q. Did you have a conversation with Miss Peck about a savings bank account which she had at that time in the United States Savings Bank of Newark?

A. I did.

Q. Will you state what Miss Peck said to you in connection with that account?

A. I was called to her home to discuss certain matters with her; she was preparing a will, that is she wanted to make some changes in her will, and asked me to see her counsel. She gave me certain notes to take to him and after she finished she said she wanted to see me alone and asked her secretary, Miss Peterson, to leave the room, and then she informed me of this deposit she had in the United States Savings Bank of some $4000. She said, "I want to have that fixed so that if I die at this time Mrs. Field will be able to get the deposit." I suggested that she should have it in a codicil. She said, "No, that she didn't want anyone to know about it," and of course I was not a savings bank man; I didn't know what the answer was to it.

Q. As a result of that conversation did you do anything?

A. Yes, I went to the United States Savings.

Q. And did you speak with someone there?

A. Yes, Mr. Heyeck, who happens to be here, I believe it was.

Q. And as a result of the conversation, Mr. Lott, did you do anything in connection with this bank account?

A. They suggested that it be put in the name of Edith M. Peck in trust for Ethel Adelaide Field, and gave me a signature card which I took to Miss Peck and had her sign; I believe that was about January 2d.

Q. 1935?

A. 1935, yes, and the account was then opened in that manner.

Q. So that the account which was in Miss Peck's sole name was closed and a new account was opened in the name of Edith M. Peck in trust for Ethel Adelaide Field?

A. That is correct.

Q. Can you state on what date subsequently Miss Peck died?

A. I believe it was the 6th of January.

Q. 1935?

A. 1935.

CROSS-EXAMINATION.

By MR. CHANDLER:

Q. Mr. Lott, did Miss Peck say anything to you with respect to the control of that account during her lifetime?

A. Yes, she did, in this fashion. I said something about the possibility of having a "survivor" account, either or survivor and Miss Peck said no, Mrs. Field's signature would probably be required in that case and she said, "I don't want her to know about it." She said, "I want her to have it if I die now, but if I get better I may not want her to have it." She said, "I don't want anyone to know anything about it."

Q. When this account was changed in the United States Savings Bank, do you recall as to what person or persons had the right to draw upon the changed account?

MR. MACFALL: That is objected to; obviously this witness is not qualified to answer that.

THE COURT: How could he know it?

MR. CHANDLER: Because Mr. Lott himself testified that at Miss Peck's direction he went down and caused this account to be changed. Now that would make the control of that account subject to his direction as her agent.

THE COURT: You may answer, if you know.

A. At the time that I went there?

Q. Yes.

A. I believe it was in Miss Peck's sole name, Edith M. Peck.

Q. Just a minute; did you have any instructions as to how that account was to be payable during Miss Peck's lifetime, as to who might draw upon it?

A. No. Miss Peck merely said that she wanted Mrs. Field to have it if she died, but that she wanted no one to know of the existence of it while she lived or if she got better.

Q. Mr. Lott, when Miss Peck died, she left a will, did she not?

A. She did.

Q. And she appointed the Fidelity Union Trust Company as executor?

A. One of the executors.

MR. CHANDLER: Your Honor please, I have here a certified copy of the last will and testament of Edith M. Peck, deceased, which I would like to offer in evidence.

MR. MACFALL: No objection.

MR. CHANDLER: I think it will be conceded that there is no reference made in the will to this account.

(Received and marked Exhibit D-1.)

Q. Did the Fidelity qualify as executor?

A. Yes.

MR. CHANDLER: I have here a certificate of the surrogate showing the qualification of both executors.

Q. There were two executors, were there not, Mr. Lott?

A. Two executors.

Q. Who were they?

A. Minton H. Twinch and the Fidelity Union Trust Company.

(Received and marked Exhibit D-2.)

Q. Mr. Lott, did you receive a pass book when you made the change in this account?

A. I cannot say definitely, Mr. Chandler; I can't remember that. I remember the card; I think I probably did, but I can't remember.

Q. Have you a pass book now as one of the executors of the estate?

A. Yes.

Q. On that account.

MR. CHANDLER: I offer this in evidence.

MR. MACFALL: May it be shown in the record what the balance is?

MR. CHANDLER: This is a pass book issued by the United States Savings Bank to Edith M. Peck in trust for Ethel Adelaide Field. After "Field" is the name "friend" in parentheses. The pass book shows there is a balance of $4146.82. If your Honor please, I think it will be admitted that the United States Savings Bank paid the balance of the account into this court and that the amount which was paid in was $4230 some odd cents, representing the additional interest and were discharged by order of the Court.

(Pass book is received and marked Exhibit D-3.)

MR. WELSH: $4230.36.

Q. That's all.

MR. MACFALL: I should like to add for the record a statement which will be consented to, I believe.

THE COURT: If it is written out why don't you just file it, counsel?

MR. MACFALL: It is written out in the pleadings; it was alleged in the pleadings and not denied, and that is that the decedent caused this account to be created with the intent and purpose of creating a valid trust for the benefit of the complainant, but that the defendants deny that a valid trust was in fact created, and that in connection with the creation of this trust account no further or other notice of the extent and terms of a legal and valid trust was given to the Savings Bank.

MR. CHANDLER: Your Honor please, that is objected to. We cannot admit any intention on the part of Miss Peck except as appears from the evidence presented.

MR. MACFALL: I simply call attention, then, that that allegation is contained in the complaint and was not denied.

MR. CHANDLER: That is not my construction of the pleadings. My impression is that it was denied.

THE COURT: Well, whatever it is.

MR. MACFALL: Whatever it is, I refer to paragraph 7 of the complaint. Plaintiff rests, if your Honor please.

WILLIAM G. HEYECK, called and sworn on behalf of the defendant United States Savings Bank, testified as follows:

DIRECT EXAMINATION.

By MR. WELSH:

Q. Mr. Heyeck, with whom are you employed?

A. United States Savings Bank.

Q. In what capacity?

A. Auditor.

Q. As auditor did you have charge of a savings account of Edith M. Peck?

A. I did.

Q. And will you state in whose name that account was originally opened?

A. Account No. 145163 originally opened in the name of Edith M. Peck on November 10, 1934, in the amount of $4000.

Q. And was the designation of this account changed?

A. It was changed on January 2, 1935, to read Edith M. Peck in trust for Ethel Adelaide Field, friend.

Q. Have you got the signature card of Miss Peck?

A. I have.

THE COURT: Is this your last witness?

MR. WELSH: Yes, sir. Your Honor please, I have here the signature card of Edith M. Peck in trust for Ethel Adelaide Field, No. 145163 with a notation "Changed 1/2/35." I offer this in evidence.

MR. MACFALL: No objection.

(Received and marked Exhibit D-4.)

Q. The notation was made on that card "In trust for Ethel Adelaide Field" at the time that the account was re-designated, is that right?

A. That's right.

Q. And when the account was originally opened, who had the right to make withdrawals from that account?

A. Miss Peck.

Q. And after the change was made so that there was the trust designation, who had the right to make withdrawals from the account?

A. Miss Peck.

Q. Anybody else?

A. No one else.

Q. Have you got with you a statement or a ledger of that account?

A. I have.

MR. MACFALL: No objection.

MR. WELSH: Your Honor please, I would like to offer in evidence the account of Edith M. Peck in trust for Ethel Adelaide Field No. 145163, showing the original deposit and the subsequent deposits, and withdrawals.

Q. That's all.

CROSS-EXAMINATION.

By MR. MACFALL:

Q. Can you state if there were any deposits in this account by the decedent, or withdrawals by her, prior to her death?

A. Only the original deposit.

Q. So that at the time of her death there had been no withdrawals by the decedent and the only additions had been the credits of interest, is that right?

A. That's correct.

Q. Were you the gentleman who had the conversation with Mr. Lott regarding the opening of this account?

A. I did.

Q. And did you advise Mr. Lott at about the time he testified that if this account were opened in this way, upon the death of Miss Peck the balance would be payable to the beneficiary?

A. That's right.

MR. WELSH: I object.

MR. CHANDLER: The question of what the intent of the parties was is a fact.

THE COURT: Was there any expression of intent made?

MR. MACFALL: Mr. Lott has testified that the decedent wanted to open this account so that if anything happened to her Mrs. Field would get the proceeds of the account. He said that as a result of a conversation he was advised by the bank that if the account were opened in this way that would be the result.

MR. WELSH: The advice from the bank would not be binding upon the defendant.

MR. MACFALL: I don't contend that it is. I simply want to show the intent of the settlor.

THE COURT: You may answer.

Q. The answer was yes?
A. Yes.

THE COURT: Is that the case?

MR. MACFALL: That's the case, your Honor please.

THE COURT: Now, do you want to argue the matter on say Monday, the legal issue, because we will have all the papers ready then?

MR. WELSH: Do you wish us to submit memoranda?

THE COURT: Do you think it is necessary?

MR. WELSH: There are three or four New Jersey cases on the point.

THE COURT: If you will just bring them in. Suppose you submit the cases to your opponent right now in a day or two.

MR. MACFALL: I have already received them; he had a short memorandum, and I have prepared a short memorandum which gives the citations.

THE COURT: Why not leave both memorandums and we will argue and decide it on Monday.

MR. WELSH: Will any argument be necessary? We are willing to submit it on the memorandum.

THE COURT: All right; are both sides willing to do that?

MR. MACFALL: Yes.

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT.

(Filed December 29, 1938.)

This cause coming on regularly for trial and the Court having heard and considered the testimony, evidence and arguments of counsel, finds the following facts:

1. The complainant, Ethel Adelaide Field, is a citizen and resident of the State of New York, residing at No. 123 East 53d Street, in the Borough of Manhattan, City, County and State of New York.

2. The defendant, Fidelity Union Trust Company, is a corporation of the State of New Jersey, having its principal office in the City of Newark, County of Essex and State of New Jersey.

3. The defendant, Minton H. Twinch, is a citizen and resident of the State of New Jersey.

4. The defendant, United States Savings Bank of Newark, New Jersey, is a corporation of the State of New Jersey, having its principal office in the City of Newark, County of Essex and State of New Jersey.

5. The matter in issue is a suit of a civil nature, in equity between citizens of different states and the amount involved in this controversy, exclusive of interest and costs exceeds the sum of three thousand ($3000) dollars.

6. Edith M. Peck, prior to her death, caused the title of a certain bank account (the subject matter of this cause), standing in her name alone, to be transferred upon the records of the United States Savings Bank of Newark, New Jersey, to the designation of "Edith M. Peck, in trust for Ethel Adelaide Field" retaining exclusive control over said account with the sole right of withdrawal therefrom, redesignation thereof and right of revocation of any previous disposition and gave no further notice of the existence or terms of any trust affecting said account.

7. The said Edith M. Peck subsequently died on January 6th, 1935, a resident and citizen of the County of Essex and State of New Jersey, leaving a last will and testament, duly admitted for probate before the Surrogate of Essex County, in the State of New Jersey, on January 18th, 1935, whereby the said Fidelity Union Trust Company and Minton H. Twinch were appointed executors and duly qualified as such.

8. Subsequent to the institution of this suit, the defendant, the United States Savings Bank of Newark, New Jersey, caused to be paid into this Court, pursuant to an order of this Court, the sum of $4230.66 being the balance of the account standing on its books in the name of "Edith M. Peck, in trust for Ethel Adelaide Field" and, upon such payment into this Court, was dismissed as a party defendant to this suit.

As conclusions of law from the foregoing facts the Court concludes:

1. That under the law of the State of New Jersey, the designation of the bank account "Edith M. Peck, in trust for Ethel Adelaide Field" did not create a trust in fact.

2. That the designation of the said bank account as aforesaid was in effect testamentary in character and as such did not comply with the statute of wills of the State of New Jersey.

3. That Edith M. Peck did not make a valid gift of the said bank account to the complainant, Ethel Adelaide Field.

4. That the complainant, Ethel Adelaide Field, has no right, title or interest in and to the proceeds of said bank account deposited with this Court.

5. That the defendants, Fidelity Union Trust Company and Minton H. Twinch, are entitled to a judgment directing that the amount of said fund deposited in this Court, less

lawful disbursements, be paid to them as executors under the last will and testament of Edith M. Peck, deceased.

Let judgment be entered in conformity herewith.

WILLIAM CLARK,
Judge.

Dated: December 29, 1938.

JUDGMENT.

This cause coming on to be heard and the Court having heard and considered the proofs, arguments and briefs of counsel and having made its findings of fact and conclusions of law;

It is thereupon on this twenty-ninth day of December, 1938, upon the motion of Hood, Lafferty and Campbell and Francis F. Welsh, solicitors of the defendants, Fidelity Union Trust Company and Minton H. Twinch, as executors under the last will and testament of Edith M. Peck and after notification to Russell C. MacFall, solicitor of the complainant, Ethel Adelaide Field, ORDERED, ADJUDGED and DECREED that the said defendants, Fidelity Union Trust Company and Minton H. Twinch, as executors aforesaid, be and the same are hereby entitled to the amount deposited by Edith M. Peck in her lifetime with the United States Savings Bank of Newark, New Jersey, and designated "Edith M. Peck, in trust for Ethel Adelaide Field" and that the complainant has no right, title or interest therein and,

It is further ORDERED, ADJUDGED and DECREED that the amount of the said fund deposited with this Court, to wit, $4230.36, less lawful costs and disbursements, be and the same shall hereby be paid over by the Clerk of this Court to the said defendants and,

It is further ORDERED that the defendants shall be entitled to receive their costs in this cause to be paid out of the said fund.

WILLIAM CLARK,
Judge.

NOTICE OF APPEAL.

(Filed March 20, 1939.)

NOTICE IS HEREBY GIVEN that Ethel Adelaide Field, the complainant above named, hereby appeals to the Circuit Court of Appeals for the Third Circuit, from the final judgment entered in this action on the twenty-ninth day of December, 1938.

Dated March 20th, 1939.

RUSSELL C. MACFALL,
Attorney for Appellant, Ethel Adelaide Field.
31 East Ridgewood Avenue,
Ridgewood, New Jersey.

STIPULATION DESIGNATING CONTENTS OF RECORD ON APPEAL.

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto, pursuant to Rule 75(f) of the Rules of Civil Procedure, that the record on appeal of this cause now pending in the Circuit Court of Appeals for the Third Circuit, shall include the following:

1. The bill of complaint, verified May 14, 1937, and filed May 19, 1937.

2. The answer of the defendants, Fidelity Union Trust Company and Minton H. Twinch, as executors of the last will and testament of Edith M. Peck, deceased, filed June , 1937.

3. The transcript of the trial evidence taken on April 25, 1938, without the exhibits.

4. The findings of fact and conclusions of law, dated December 29, 1938, and filed December 29, 1938.

5. The final judgment, dated December 29, 1938, and filed December 29, 1938.

6. The complainant's notice of appeal, dated and filed March 20, 1939.

7. A stipulation for the record, as follows:

"The parties to this appeal agree that the inclusion in the record on appeal of the exhibits introduced in evidence on the trial of this cause, being fully referred to in the transcript of testimony, shall be dispensed with; and

IT IS FURTHER STIPULATED that the Last Will and Testament of Edith M. Peck, deceased, marked in evidence as Exhibit D-1, was dated the 12th day of January, 1933, with codicil dated January 2, 1935, was duly admitted to probate on the 18th day of January,

1935, by the Surrogate's Court of Essex County, and that the defendants, Fidelity Union Trust Company and Minton H. Twinch, were duly appointed as Executors of the said Last Will and Testament by the said Surrogate's Court of Essex County on or about January 18th, 1935, duly qualified and still are acting as such Executors; that the savings bank account with the United States Savings Bank, of Newark, the subject matter of this suit, was not mentioned or referred to in the said Last Will and Testament, and that the defendant, United States Savings Bank, of Newark, pursuant to an order of this Court, dated July 1, 1937, duly paid into the Court the amount standing to the credit of said bank account, in the sum of $4230.36, and was thereupon discharged from any further defense or participation in this suit."

and

IT IS FURTHER STIPULATED AND AGREED that the said record on appeal may be filed with the Appellate Court as of time.

Dated May 12th, 1939.

RUSSELL C. MACFALL,
Attorney for Complainant-Appellant.

HOOD, LAFFERTY & CAMPBELL,
Attorneys for Defendant-Appellee, Fidelity Union Trust Company, as Executor of the Last Will and Testament of Edith M. Peck, Deceased.

FRANCIS F. WELSH,
Attorney for Defendant-Appellee, Minton H. Twinch, as Executor of the Last Will and Testament of Edith M. Peck, Deceased.

[fol. 29] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1939

No. 7055

ETHEL ADELAIDE FIELD, Appellant,

vs.

FIDELITY UNION TRUST COMPANY and MINTON H. TWINCH, as Executors of Edith M. Peck, Deceased; and United States Savings Bank of Newark, Appellees

And afterwards, to wit, the 19th day of October, 1939, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable Francis Biddle, Honorable Charles Alvin Jones and Honorable Joseph Buffington, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 20th day of December, 1939, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

[fol. 30] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1939

No. 7055

ETHEL ADELAIDE FIELD, Appellant,

vs.

FIDELITY UNION TRUST COMPANY and MINTON H. TWINCH, as Executors of Edith M. Peck, Deceased; and United States Savings Bank of Newark, Appellees

Appeal from the District Court of the United States, for the District of New Jersey

OPINION—Filed December 20, 1939

Before Biddle, Jones and Buffington, Circuit Judges

BIDDLE, Circuit Judge:

This appeal involves the construction of the New Jersey Act validating tentative trusts with respect to saving bank

deposits; and the extent to which our court must or should follow two decisions of the Court of Chancery of New Jersey, not a court of final resort, holding the Act void.

Edith M. Peck on January 2, 1935, transferred a savings account with United States Savings Bank of Newark to "Edith M. Peck, in trust for Ethel Adelaide Field". Peck died on January 6, 1935. This transfer was made after she had told the assistant trust officer of Fidelity Union Trust Company, one of her executors, that she wanted Field to get [fol. 31] the deposit when she died. The Savings Bank refused to pay Field the deposit, and she accordingly filed her bill of complaint against it and the executors. The Savings Bank paid the money into court. The District Court for the District of New Jersey awarded the fund to the Executors.

There has been a conflict in the cases as to whether so-called "tentative trusts", in the form of "A in trust for B", create rights in the beneficiary. Obviously such deposits do not fulfill the strict requirements of true trusts. However, they have been accepted as trusts by the weight of authority.[1] But the New Jersey Courts have rejected them, chiefly on the ground that no true trust is created where the donor or settlor still exercises control over the gift. Stevenson v. Earl, 65 N. J. Eq. 721, 55 Atl. 1091; Nicklas v. Parker, 69 N. J. Eq. 743, 61 Atl. 267 (Court of Chancery) affirmed by the Court of Errors and Appeals, 71 N. J. Eq. 777, 71 Atl. 1135.

In 1903 the New Jersey legislature passed an act modifying the law.[2] Although the controlling facts in the Nicklas case occurred after the 1903 statute had been adopted, the court made no reference to the act. This statute is sub-

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[1] Perry, Trusts (6th Ed. 1911) § 96, Note a; Bogert, Trusts and Trustees, § 47; Scott on Trusts (1939) § 58.3; Restatement of the Law, Trusts, § 58, Tentative Trust of Savings Deposit: "Where a person makes a deposit in a savings account in a bank in his own name as trustee for another person intending to reserve a power to withdraw the whole or any part of the deposit at any time during his lifetime and to use as his own whatever he may withdraw, or otherwise to revoke the trust, the intended trust is enforceable by the beneficiary upon the death of the depositor as to any part remaining on deposit on his death if he has not revoked the trust."

[2] Sec. 32, 4 Comp. St. 1910, 5666.

stantially identical with the Act of 1932, which we are called upon to consider, except that the earlier Act provided that the money in the deposit "may be paid" to the intended beneficiary; whereas the statute before us requires such pay-
[fol. 32] ment. Apparently because of this phrase, the New Jersey courts, still reluctant to admit a change in the basic law, held that the 1903 Act merely protected payment by the bank to the intended beneficiary, but gave him no rights.[3]

In 1932 the New Jersey Legislature, evidently with the intention of changing the law so as completely to validate tentative trusts, adopted the following statute:

"1. Whenever any deposit shall be made with any savings bank, trust company or bank by any person in trust for another, and no other or further notice of the existence and terms of a legal and valid trust shall have been given in writing to the savings bank, trust company or bank, in the event of the death of the trustee, the same or any part thereof, together with the dividends or interest thereon, shall be paid to the person in trust for whom the said deposit was made, or to his or her legal representatives and the legal representatives of the deceased trustee shall not be entitled to the funds so deposited nor to the dividends or interest thereon notwithstanding that the funds so deposited may have been the property of the trustee; *provided,* that the person for whom the deposit was made if a minor, shall not draw the same during his or her minority without the written consent of the legal representatives of said trustee."[4]

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[3] Jefferson Trust Co. v. Hoboken Trust Co., 107 N. J. Eq. 310, 152 Atl. 374 (Court of Chancery). This is in accord with the general interpretation of similar statutes. Restatement, Trusts, §58, com. d.

[4] It is interesting to note that this section was adopted identically in four different amendments, all of which were approved on March 28, 1932; Ch. 40 to 43 incl. Laws of 1932. These were evidently passed to make certain so far as possible that the titles of the amendments did not offend the provision of the constitution requiring that every law should embrace but one object (Art. IV, Sec. VII, Par. 4). Ch. 40 is entitled: "An Act concerning trust deposits in savings banks, trust companies and banks where other than the deposit in trust no other or further notice is given in writing

[fol. 33] This statute was considered twice in 1936 by the Court of Chancery of New Jersey, a court of original jurisdiction, in Thatcher v. Trenton Trust Company, 119 N. J. Eq. 401, 182 Atl. 912, and Travers v. Reid, 119 N. J. Eq. 416, 182 Atl. 908. The facts in these two cases cannot be distinguished from those here in question. The *Thatcher* case involved two bank accounts, the first of which was opened prior to the passage of the act, and the second thereafter. Both cases held that the statute did not change the pre-existing law. It is not clear to what extent the cases consider the statute unconstitutional. Before examining more closely the reasoning and result of the cases, we should determine to what extent their decisions bind us.

In Erie R. Co. v. Tompkins [5] it was held that there was no such thing as federal "general" or common law, and that federal courts must apply not only the statutory state law, but the common law of the state as well. The doctrine of Swift v. Tyson had recognized not only the application of state laws, but, necessarily, the application of the state cases construing them. "Rights and titles to things having a permanent locality, such as the rights and titles to real estate" [6] fell, too, into the rule. Four years later the Supreme Court in Beals v. Hale,[7] in construing two apparently conflicting Michigan statutes, arrived at a conclusion similar to that adopted by an inferior state court; and, in emphasizing the principle laid down in prior cases, that the federal courts are bound by the constructions of state statutes by state courts, made it clear that such acceptance was to be accorded only to the highest judicial tribunals. "Had that decision [fol. 34] been made by the highest judicial tribunal of the state, or been shown to accord with a settled usage and practice under these statutes affecting the title to real estate, we should have felt bound to conform to it, as a part of the local law." The court cited supporting cases all decided before Swift v. Tyson. However these decisions do not seem to have

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of the existence and terms of the trust." The other acts amend the act concerning saving banks, the act concerning banks and banking, and the supplement to the act concerning trust companies, respectively.

[5] 304 U. S. 64.

[6] 16 Peters 1, 18.

[7] 4 Howard 37, 54.

crystallized the law to a point where it could be said that only the pronouncements of the highest tribunal of a state are binding.[8] But definitely this is what the court meant in [fol. 35] the Beals case, for the opinion continues: "But though entitled to respect and weight, that case (Weed et al v. Lyon et al, Harr. (Mich.) 363 (1845), decided by the Chancellor) has not been treated as a precedent to control

[8] Polk's Lessee v. Wendall, 9 Cranch 87, 98: "In cases depending on the statutes of a state, and more especially in those respecting title to land, this court adopts the construction of the state *where that construction* is settled, and can be ascertained." It would appear that such construction cannot be "settled" until a decision by the highest state court.

Gardner v. Collins, 2 Pet. 58, 85: "If this question had been settled by *any* judicial decision in the state, where the land lies, we should, upon the uniform principles adopted by this court, recognize that decision as a part of the local law."

Thatcher et al v. Powell et al, 6 Wheat, 119, 127: "In construing the acts of the legislature of a state, *the decisions of the state tribunals* have always governed this court." The court then cites a Tennessee Supreme Court case, Francis's Lessee v. Washburn & Russell, 5 Hayw. 294, as settling the law in Tennessee, but adds: "On the authority of that case, *and on principle,* the court is of opinion, that there is no error in the judgment of the circuit court," thus indicating that had principle been otherwise, opportunity to differ might have been afforded.

Elmendorf v. Taylor, 10 Wheat. 152, 160: ". . . The construction given by the Courts of the several States to the legislative acts of those states, is received as true, unless they come in conflict with the constitution, laws or treaties of the United States."

Shelby v. Guy, 11 Wheat. 361, 367: "That the statute law of the states must furnish the rule of decision to this court, so far as they comport with the constitution of the United States, in all cases arising within the respective states, is a position that no one doubts. Nor is it questionable, that a fixed and received construction of their respective statute laws, in their own courts, makes, in fact, a part of the statute law of the country, however we may doubt the propriety of that construction." (Emphasis supplied.)

this, because the judgment was not in a court of the last resort, and is said to have been appealed from, but further proceedings defeated by some accident."

In Erie R. R. Co. v. Hilt, 247 U. S. 97, 100, a New Jersey statute forbade recovery to a person injured while walking or playing on any railroad. The trial court, affirmed by the Circuit Court of Appeals for this Circuit, allowed the case to go to the jury, construing the act not to cover the plaintiff who was a child seven years old. The Supreme Court, in an opinion by Mr. Justice Holmes, reversed on the ground that: "The words of the statute seem to us to require a different construction from that adopted and they have been given their full literal meaning by the Supreme Court of the State in the case of an infant younger than the plaintiff. Barcolini v. Atlantic City & Shore R. R. Co., 82 N. J. L. 107." The court added: "In view of the importance of that tribunal in New Jersey, although not the highest Court in the State, we see no reason why it should not be followed by the Courts of the United States, even if we thought its decision more doubtful than we do." Mr. Justice Day and Mr. Justice Clarke dissented, "in the absence of a decision of the highest Court of New Jersey holding otherwise."[9] It should be noted that the court did not express the view that the matter was stare decisis, but followed the decision of the Supreme Court of New Jersey, sitting as an intermediate appellate court, "in view of the importance of that tribunal". Members of the Supreme Court of New Jersey are also members of the Court of Errors and Appeals, the court of last resort of the state, and not, as in our case, trial [fol. 36] judges unconnected with any appellate tribunal. And the Hilt case does not say that the federal courts must follow the decisions of a trial court of New Jersey in construing a New Jersey statute.

A similar conclusion based on the Hilt decision was reached by our court in Berlet v. Lehigh Valley Silk Mills, 287 Fed. 769, 772, where we followed a decision of the Superior Court of Pennsylvania in holding unconstitutional as class legislation the Act of Pennsylvania of May 23, 1907, P. L. 228, as amended, giving throwsters of silk a lien. But

[9] In Oakes v. Mase, 165 U. S. 363, 364, the Supreme Court said: "As this ruling *of the court of last resort* of the state of Montana, interpreting the constitutionality of laws of that state, is binding here * * * (italics supplied".

the Superior Court is an important appellate tribunal whose decision is final (subject to certiorari) in a very broad field of jurisdiction; and the case did not go to the length of saying that its decision was stare decisis, and must be followed. Recently referring to the Superior Court, in Taplinger v. Northwestern Nat. Bank, 101 F. (2d) 274, 278, we used, perhaps, somewhat broad language when we said: "However, since it was squarely raised by the facts of the Kauffman & Baer Case, the decision in that case amounts to a construction of the statute by a Pennsylvania appellate court of high authority which we must accept as binding upon us, even though if the matter were open for our consideration a different conclusion might well be reached."

In North Philadelphia Trust Co. v. Smith, 13 F. (2d) 585, 586, our court followed the decision of the Supreme Court of New Jersey in construing the Negotiable Instruments Law, which was in conflict with the Pennsylvania decisions construing that uniform instrument. We said: "This was a decision by the Supreme Court of New Jersey, not by the Court of Errors and Appeals. That court, however, though not the highest court of the state, is, in the estimation of the Supreme Court of the United States, as shown in Erie R. R. Co. v. Hilt * * * of such standing as to compel the courts of the United States to follow its pronouncements." In Masino v. W. J. & S. S. R. Co., 41 F. (2d) 645, 646, in considering a railroad crossing statute of New Jersey, we spoke of cases which had contrued the act decided by the Supreme [fol. 37] Court of New Jersey, as compelling observance to their decisions. And in Ex Parte Zwillman, 48 F. (2d) 76, 78, quoting at length from the Hilt opinion, we followed the construction of a New Jersey statute relating to the imposition of sentences made by the New Jersey Supreme Court. Our language went a little further in Radin v. Commissioner of Internal Revenue, 33 F. (2d) 39, in determining that an interest in a contract for the purchase of land was real estate by virtue of a decree of the New Jersey Court of Chancery thus ruling. We held, in referring to the rule of law suggested in the Hilt case: "The matter has been decided by a high state court of competent jurisdiction whose decision, involving a rule of property, federal tribunals must follow." But the decision of the state court followed in this case was in the nature of res adjudicata rather than stare decisis. The scope of the case goes no further than to insist that the decision of any state court

construing an instrument is finally determinative on the federal court where the question to be decided depends on such construction. Blair v. Commissioner, 300 U. S. 5.

These cases come pretty close to saying that a federal court must follow the construction of a state statute made by a court not of final resort. But that we have followed such construction does not necessarily involve that in all instances we must do so. The distinction between the authority of appellate courts and of trial courts was made in In re F. & D. Co., 256 Fed. 73, 76, by the Circuit Court of Appeals for the Second Circuit, who were faced with the construction of a lien law of the state of New York by a New York trial court. The decision had been made by special term of the Supreme Court of Saratoga County in Clement v. Congress, 72 Misc. Rep. 519, 132 N. Y. Supp. 16, and the federal court accepted it, emphasizing particularly, however, that the Hilt case did not lay down "a rule which makes it incumbent on this court to adopt a construction given to a state statute by a trial judge in a state [fol. 38] court." The court pointed out the distinction between the Supreme Court of New Jersey, a court composed of nine judges, and the special term of the Supreme Court of New York, consisting of a single trial judge.

Two cases in the Circuit Court of Appeals for the Seventh Circuit seem to be in conflict. In deciding that under the Indiana law a conditional sale of personal property for the purposes of resale with an agreement reserving title in the seller was void, the court felt impelled to follow the decision of the Appellate Court of the state, In re Gilligan, 152 Fed. 604. The statute creating the Appellate Court made its jurisdiction final except in the event that the case was transferred to the Supreme Court or the Supreme Court ordered certification. Yet in Damen & Jarvis Bldg. Corp. v. Mechanics' Ins. Co., 83 F. (2d) 793, the same federal court refused to adopt an interpretation of a fire insurance policy by the same state court where the question had not been adjudicated by the State Supreme Court, and a recent decision of the Supreme Court had indicated doubt.

The Eighth, Sixth and Second Circuits are clear that their courts are not bound by interpretation of a statute by any court other than the highest court of the state. In the Eighth Circuit this conclusion was reached in Anglo-American Land Company v. Lombard, 132 Fed. 721, 741, 742, where the court said: "A fixed and settled rule of decision

in a state court of last resort establishes the law of the state in such manner as to bind the federal courts in all matters controlled by the state law; but the opinions of intermediate appellate courts, like the Kansas City Court of Appeals, while entitled to great respect and regarded as persuasive authority, are not controlling upon the federal courts, because they do not settle the law of the state." In construing a Missouri statute requiring dangerous machinery in factories to be guarded, the same court, in Federal Lead Co. v. Swyers, 161 Fed. 687, 691, refused to follow three cases in the Kansas City Court of Appeals, and said: "While those decisions by reason of the learning and ability [fol. 39] of the distinguished judges who pronounced them, are entitled to our respectful consideration, they are not the decisions of the highest judicial tribunal of the state * * * construing local statutes, which alone are binding upon federal courts." The same court reaffirmed this rule in Westerlund v. Black Bear Mining Co., 203 Fed. 599, 609, in construing a statute dealing with the powers of directors of mining companies. The decision of the Colorado Court of Appeals, not the highest judicial tribunal of the state, was termed "not an authoritative declaration of the law in the state of Colorado * * * " Similarly, Freund v. Yaegerman, 27 Fed. 248 (Circuit Court E. D. of Mo.).

In United States Telephone Co. v. Central Union Tel. Co., 202 Fed. 66, 69, the Circuit Court of Appeals for the Sixth Circuit said: "It is clear that the obligation to follow the lead of the state courts does not arise, unless the court to be followed is the court of last resort in the state * * * and particularly so when the lower court opinions are not unanimous or numerous and old enough to show a settled rule."

Most recently the second circuit, in Irving National Bank v. Law, 9 F. (2d) 536, 537, speaking through Judge Learned Hand, in deciding whether the judgment of the Appellate Division of the Supreme Court of New York on the meaning of a New York statute was conclusive on the federal court, after referring to the cases which we have cited, said: "We understand the doctrine to mean that the highest court of the state, by declaring what a statute means, settles it, because there is no authority which can gainsay it. Yet, however conclusive between parties to a suit the decision of a lower court is of course not authoritative upon the highest court; the statute necessarily remains in nubibus,

and its construction may be as it will." The court refused to follow the conclusion of the Appellate Division. Judge Hand thought that the Gilligan case "stands alone." In Continental Securities Co. v. Interborough R. T. Co., 165 Fed. 945, 959 the Circuit Court for the Southern District of [fol. 40] New York, was of the opinion that the federal courts are not bound by decisions of the Appellate Division. "The lower federal courts are bound by the decisions of the highest court of a state giving construction to the Constitution or statutes of the state * * * but are not bound by its decision on questions of general commercial law, etc."

We believe that the proper rule is that federal courts should in all instances follow the law of the state with respect to the construction of state statutes. Where that law has been determined by the courts of last resort their decisions are stare decisis, and must be followed irrespective of our opinion as to what the law ought to be. As to the pronouncements of other state courts, however, we are not so bound, but may conclude that the decision does not truly express the state law.

The Thatcher and Travers cases may now be discussed. In the Thatcher case the Vice-Chancellor held that the Act of 1932 was "ineffective to change the prior rules of law." He spoke of the Act as obviously unconstitutional, though not so stated in the syllabus by the Court. He conceded the attempt of the legislature to accomplish a change in the law, but held the attempt abortive because the language used by the legislature "was confused, impractical and wholly unsatisfactory and difficult to comprehend." He thought that the words "the same or any part thereof" referring to the deposit, although intended to mean "the bank deposit or such part of it as remains," did not say so, and that he could not supply the defects of the legislature. Such a construction violates the plain if not artistic language of the statute, and the fundamental rule of statutory construction that a statute must be construed to give effect to its intent. The Vice-Chancellor found the intent plain, but refused to give it effect.[10] He thought that the provision in the stat-

[10] Compare: "We have the old law, the mischief and the remedy, and it is our duty to 'so construe the act as to suppress the mischief and advance the remedy' 1 Bl. Com. 87." Soden v. Trenton, etc. Traction Co. 101 N. J. L. 393, 396, 127 Atl. 558, 559. In re Merrill, 88 N. J. Eq. 261, 293, 102 Atl. 400, 405.

[fol. 41] ute that no other notice of the existence of the trust had been given to the bank was a condition precedent to the operation of the statute. In the Thatcher case no such notice had been given; in our case it had. The Vice-Chancellor considered, however, that the requirement of notice created an unreasonable and therefore unconstitutional classification, suggesting that where notice was given (as here) the beneficiary would take nothing. But the notice concerns a valid and completed trust and not the type of deposit that the statute validates. The reasonable construction is that it eliminates the necessity of notice of a true trust to the bank as a required step to make the trust existent. Of course if such notice is given to the bank the terms of the notice cover the disposition of the money; but where we have no declaration of trust, merely the opening of a deposit in trust for a named beneficiary, the statute becomes applicable.

In the Travers case the court held that the statute could not operate as an amendment to the Wills Act because of its title. But the Court of Errors and Appeals of the State of New Jersey has indicated that such a deposit is an *inter vivos* trust and not a testamentary disposition, Cutts v. Najdrowski, 123 N. J. Eq. 481, 198 Atl. 885. The deposit read: "Leon Najdrowski intr. for Joseph Najdrowski", and was made in the Williams Bank in New York by a New Jersey depositor whose administratrix claimed it. The Chancellor had held that the law of New Jersey where the depositor had been domiciled, controlled.[11] Although reference was made to both the Thatcher and Travers cases, the statute was not mentioned, nor its construction by these two cases. The Court of Errors and Appeals reversed on the ground that the law of New York governed the transaction, thus necessarily deciding the transaction was in the [fol. 42] nature of a trust inter vivos and not testamentary, for had it been testamentary it would have been governed by the law of New Jersey. Further the Vice-Chancellor held in the Travers case that the act must be ineffective because it applied "whenever any deposit shall be made in trust, and no true trust was created, so that the act did not become effective." The Thatcher case had come to an opposite conclusion, construing the words "in trust" as descriptive of the deposit rather than characterizing its legal

[11] 121 N. J. Eq. 546, 191 Atl. 867.

effect. Serious constitutional defects were hinted, but not specified. The court refused to enforce the Act without clearly saying that it was unconstitutional.[12]

We hold, therefore, that the law of New Jersey is the law expressed in the statute which seems to us clearly constitutional and unambiguous, and that we are not bound to follow contrary decisions of the Chancery Court of New Jersey.

Judgment reversed, with directions to enter a decree in conformity with this opinion.

BUFFINGTON, Circuit Judge (concurring):

I concur in the conclusion reached by the court. The statute of New Jersey is clear and unambiguous; it calls for no construction. But the question is as to the enforcement of a law passed by a sovereign state in a matter of which it has jurisdiction. The wording of the statute is applicable to the facts of the present case. In the absence of any decision by the court of highest resort of New Jersey holding the act unconstitutional and inapplicable, I am of opinion that this court is free to apply the statute to the facts of this case. I therefore concur in the conclusion reached.

[fol. 43] JONES, Circuit Judge (dissenting):

The fundamental question presented by this appeal is of such general importance that I am constrained to state the reasons for my disagreement with the majority.

When Swift v. Tyson, 16 Peters 1, was overruled by Erie Railroad Co. v. Tompkins, 304 U. S. 64, and Section 34 of the Judiciary Act of 1789[1] was held to refer to the common law of a State as well as to its statute law, the Supreme Court made plain that it is the law of a State, as declared by the authority of the State (legislative and judicial) which is binding on a federal court upon a question of local law. Nonetheless, the decision of the majority in

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[12] "But the decision in this cause does not necessarily turn upon the constitutionality of the Act."

[1] Judiciary Act of September 24, 1789, c. 20, 28 USCA Sec. 725.

the present case denies appropriate effect, as it seems to me, to the law of New Jersey as so declared.

From their own independent construction of a statute of New Jersey (Laws of 1932, c. 40 and 41), the majority conclude that Mrs. Field became entitled, upon the death of Miss Peck, to the bank deposit in dispute, notwithstanding that, on two separate occasions and upon facts which, as the majority opinion states, "cannot be distinguished from those here in question", the New Jersey Court of Chancery has held that the statute was ineffectual to accomplish the result which the majority now reaches in the present case. See Thatcher v. Trenton Trust Co., 119 N. J. Eq. 408, 182 Atl. 912, and Travers v. Reid, 119 N. J. Eq. 416, 182 Atl. 908.

No appeal was taken from the final decree in either the Thatcher or Travers case, supra, and, although each was decided early in 1936 and the New Jersey legislature has been in regular session four times since then, the effect of those decisions has not been changed by subsequent legislative action or further judicial decision. Aside from the Thatcher and Travers cases, supra, there are no other reported court decisions of New Jersey construing the Act in [fol. 44] question. Presumably the statute of 1932, as construed by the New Jersey Chancery Court, expresses the law of the State, with reference to the particular subject matter, as the people of New Jersey desire it to be. Such is their right without federal let or hindrance. Undeniably, the Constitution, laws, or treaties of the United States are not involved in the present case in the slightest way. See Erie Railroad Co. v. Tompkins, supra, where Mr. Justice Brandeis, speaking for the majority, quoted with approval from the dissenting opinion of Mr. Justice Field in Baltimore & Ohio R. R. Co. v. Baugh, 149 U. S. 368, 401, in part, as follows, at page 79,—"Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State and, to that extent, a denial of is independence."

Yet, the majority conceive that we are free to disregard the decisions of the Chancery Court and to construe the statute as we will. On the contrary, the proper course for

this court, when called upon to ascertain and declare the statute law of a State, would be to accept the statutes of the State, as uniformly construed by its important courts of competent jurisdiction (although not the highest), in the absence of any decision by the State court of last resort. Section 34 of the Judiciary Act of 1789, even as too narrowly restricted by Swift v. Tyson,[2] supra, appears to have required as much. There was then no suggestion that, in the matter of State decisions on statute law binding on federal courts, the "local tribunals" (there specified) meant only a State court of last resort.

[fol. 45] In any event, our duty to apply the statute law of New Jersey as construed by the Court of Chancery of that State is hardly open to question any longer.

In the case of Erie R. R. Co. v. Hilt, 247 U. S. 97, 100, 101 (1918), this court, having declined to follow the construction of a New Jersey statute as theretofore determined by a decision of the Supreme Court of that State (not the court of last resort), made and applied its own independent construction. In reversing the judgment of this court the Supreme Court, in an opinion by Mr. Justice Holmes, said,—

"The words of the statute seem to us to require a different construction from that adopted and they have been given their full literal meaning by the Supreme Court of the State in the case of an infant younger than the plaintiff. *Barcolini v. Atlantic City & Shore R. R. Co.*, 82 N. J. L. 107. *In view of the importance of that tribunal in New Jersey, although not the highest Court in the State, we see no reason why it should not be followed by the Courts of the United States, even if we thought its decision more doubtful than we do.*" (Emphasis supplied.)

The question as to whether, in applying the statute law of a State, we are bound to follow only the decisions of the highest court of the State was directly before the Supreme Court in the Hilt case, supra, and was there answered in the negative. This is plainly evidenced by the fact that

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[2] It was said in Swift v. Tyson, 16 Peters 1, that "the true interpretation of the thirty-fourth section limited its application to state laws strictly local, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals", etc.

two of the members of the Court dissented from the judgment in the Hilt case on the ground that this court was right, "In the absence of a decision of the highest court of New Jersey holding otherwise", when we independently construed the statute contrary to the decision of the New Jersey Supreme Court. But, by direct contrast, the majority of the court ruled otherwise.

Since then, this court has had a number of occasions to comply with the Supreme Court's instructions in the Hilt [fol. 46] case, supra, which we have done uniformly up to the present time with the exception of one instance.

Thus, in expressed obedience to the Hilt case, supra, Murray v. Payne, 273 Fed. 820 (C. C. A., 3rd, 1921), applied the New Jersey Supreme Court's construction of a State statute; likewise, North Philadelphia Trust Co. v. Smith, 13 F. (2d) 585 (C. C. A., 3rd, 1926), followed the construction of the New Jersey Negotiable Instruments Act made by the Supreme Court of that State; Masino v. West Jersey & S. S. R. Co., 41 F. (2d) 645 (C. C. A., 3rd, 1930), cited the Hilt case and said that the Supreme Court of New Jersey was "of sufficient importance to compel observance of its decisions"; and Ex parte Zwillman, 48 F. (2d) 76 (C. C. A., 3rd, 1931), quoting at length from the Hilt case, followed the New Jersey Supreme Court's construction of a New Jersey statute. Also Berlet v. Lehigh Valley Silk Mills, 287 Fed. 769 (C. C. A., 3rd, 1923), and Steinbach, et al., v. Metzger, et al., 63 F. (2d) 74 (C. C. A., 3rd, 1933), each cited the Hilt case in support of their respective observance of a statutory construction in the one case and a decision based on the common law in the other by the Superior Court of Pennsylvania (a high and important court, it is true, but still not the court of last resort). And, in Radin v. Commissioner of Internal Revenue, 33 F. (2d) 39 (C. C. A., 3rd, 1929), this court, in what it deemed to be compliance with the Supreme Court's requirement in the Hilt case, applied as the law of New Jersey a decision of the Chancery Court of that State. True enough, as the majority opinion in the present case points out, the decision in the case last above cited involved a rule of property, and its acceptance could have been as res adjudicata rather than as stare decisis. But, it is not without point that in the Radin case, supra, Judge Woolley, speaking for this court, described the Court of Chancery of New Jersey (with whose decisions we are now concerned) as "a high state court of competent jurisdiction".

Any thought that the ruling in the Hilt case, supra, was because of the Supreme Court's agreement with the New [fol. 47] Jersey court's construction of the particular statute rather than because of the duty resting upon the federal courts, in matters of local law, to follow a State statute, as construed by an important State court of competent jurisdiction, should be dispelled by the later decision of the Supreme Court in the case of Erie Railroad Co. v. Duplak, 286 U. S. 440, 444 (the one earlier instance where this court failed to follow the ruling of the Hilt case). In the Duplak case, supra, the New Jersey decision which this court declined to follow was the same decision by the Supreme Court of New Jersey (Barcolini v. Atlantic City and S. R. R. Co., supra), which had been rejected by this court in the Hilt case. In the Duplak case, supra, the Supreme Court makes no mention of its agreement with the construction of the statute as made by the Supreme Court of New Jersey, but, on the other hand, says, "The effect of the *Hilt* decision is to accept the state statute, as construed by the state court, as having put a negative upon the implied invitation and attractive nuisance doctrines; and the same statute necessarily controls here whatever, otherwise, might be the rule."

As we should have been compelled to observe a decision of the Supreme Court of New Jersey, construing the statute in the present case, as declaratory of the law of the State, it follows, necessarily, that, if we are now at liberty to ignore the construction placed on the statute by the Court of Chancery, it must be because the New Jersey Court of Chancery is not equal in its importance or finality to the Supreme Court of that State. But, such is plainly not the case.

The decrees of the Chancery Court like the judgments of the Supreme Court are state-wide in their effect and in either case are appealable to the Court of Errors and Appeals (the highest State court). There is no intermediate court of appeal empowered to review the work of either. Within their respective jurisdictions, the one in equity and the other at law, the importance and finality of New Jersey's [fol. 48] Court of Chancery is on a parity with that of the Supreme Court of the State. The decisions of the one are not to be treated as stare decisis any more than are the decisions of the other.

The majority describe the Court of Chancery as "a court of original jurisdiction" and the Supreme Court as "an

intermediate appellate court",[3] from which the implication may arise that there is a difference in standing between these two courts with the Court of Chancery in the inferior position. The description is correct so far as it goes, but it fails to suggest the co-extensive territorial jurisdiction of both courts and the equal finality of their respective decres and judgments, save for a direct appeal from either to the court of last resort. Significance is also attached by the majority to the fact that the Judges of the Supreme Court help to compose the Court of Errors and Appeals, but so does the Chancellor, the presiding judicial officer of the Chancery Court, through whom all writs and decrees in equity issue and who supervises and effectuates the adjudications and decrees filed by the Vice-Chancellors.

If further confirmation of the equal importance of these two tribunals, within the State of New Jersey, should be required, let it be noted that the highest court of the State, the Court of Errors and Appeals, regards them as equally important. In Levy v. City of Elizabeth, 81 N. J. L. 643, 80 Atl. 498, 500, the Court of Errors and Appeals, upon an [fol. 49] appeal from the Supreme Court of New Jersey, said, "Irrespective of the inherent merit of this construction, a ruling uniformly made by the Supreme Court over a course of years should not be set aside by us except for cogent and important reasons", etc. Later in Ramsey v. Hutchinson, 117 N. J. L. 222, 187 Atl. 650, again, upon appeal from the Supreme Court of New Jersey, the Court of Errors and Appeals quoted the above from Levy v. City of Elizabeth, supra, and added in brackets, after the words Supreme Court, "or the Court of Chancery". Thus, although the appeal then under consideration was one at law from the Supreme Court of the State, the Court of Errors and Appeals took pains to place the Court of Chancery in

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[3] The appellate jurisdiction of the Supreme Court of New Jersey, when invoked, is optional with the litigant rather than compulsory. Thus, the appellant may take an appeal from a court of first instance at law to the Supreme Court of New Jersey, or he may appeal directly to the Court of Errors and Appeals; and, if he chooses to take his appeal to the Supreme Court, either party may, thereafter appeal, as of right, to the Court of Errors and Appeals from the judgment of the Supreme Court. N. J. Rev. 1877, p. 373 §§ 4 and 5; Rev. Stat. (1937) sections 2:27-351 and 2:27-352.

juxtaposition with the Supreme Court of the State so far as the importance of the decisions of either court is concerned.

The justification for our saying, as the majority in effect do, that the Chancery Court of New Jersey is a less important tribunal than the Supreme Court of that State, is not apparent to me. And, with that distinction gone, the reason for our refusal to follow the decisions of the Chancery Court, pertinent to this case, vanishes completely.

Moreover, the decision of the majority leads directly to the situation where a statute of New Jersey when construed in chancery can never become the law of the State, so as to be binding on a federal court, until it has been passed upon and affirmed by the Court of Errors and Appeals, while the same statute when construed at law (Supreme Court of New Jersey) will bind us, without utterance from the Court of Errors and Appeals, even though the decision is later taken to the latter court for review and there reversed. This resultant anomaly, of itself, argues strongly for our acceptance of the decisions of the Court of Chancery of New Jersey equally with the decisions of the Supreme Court of that State.

While many cases of the past, as the majority opinion discloses, can be cited for the proposition that it is a decision [fol. 50] of the court of last resort of a State which binds a federal court on a question of local law, nevertheless, at least since the Hilt case, supra, we are also bound by the construction of a State statute made by an important court of the State although not the highest.

The intent, scope and effect of a State statute are, in a very real sense, what important courts of the State impute to it, just as effectively as if the statute had been so enacted by the legislature. Until reversed on appeal or offset by the legislature, a decision of a State court of competent jurisdiction construing a statute becomes a component part of the law thus effected. We cannot, therefore, fairly take a statute separate from the decisions construing it and arbitrarily give it our own independent construction. To do so would be to ascertain less or other than the State law. In this connection the words of Mr. Justice Holmes in his dissenting opinion in Kuhn v. Fairmont Coal Co., 215 U. S. 349, 372, which later found effect in the majority opinion in Erie R. R. Co. v. Tompkins, supra, are apposite,—"It is said that we must exercise our independent judgment

—but as to what? Surely as to the law of the States. Whence does that law issue? Certainly not from us. But it does issue and has been recognized by this court as issuing from the state courts as well as from the state legislatures."

Concurrently with the decision of the majority, and growing out of the same New Jersey statute, there will be one rule of law for resident claimants who are committed to the courts of New Jersey, and a different rule for such non-resident claimants as can, by reason of the mere accident of diverse citizenship and amount in controversy, invoke federal jurisdiction for the enforcement of their equally private and local claims. On the other hand, if we would but follow the decisions of the Chancery Court with respect to the particular statute here involved, it could make no difference from the standpoint of a claimant's rights whether his action was brought under federal or state [fol. 51] jurisdiction. We should leave to the proper authority (Court of Errors and Appeals or State Legislature) any corrections of the Chancery Court's decisions that may be deemed advisable. This, we should do without speculation on our part as to what either the Court or the Legislature may do in the future.[4] By so doing, we shall insure that the federal litigant will fare no differently or better than one in the State courts. Instead, however, the decision of the majority will serve to render the New Jersey statute non-uniform in its application and, at the same time, we shall remain powerless to render this court's ruling dominant throughout the State or to change the law there obtaining. The intendment of the decision in Erie R. R. Co.

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[4] The majority infer from the case of Cutts v. Najdrowski, 123 N. J. Eq. 481, 198 Atl. 85, that the Court of Errors and Appeals viewed the "deposit in trust" in that case as a gift inter vivos rather than as a testamentary disposition. That deposit, while in trust, had been in a New York bank. After the depositor's death it had been withdrawn by the beneficiary and, by him, deposited in a bank in New Jersey. The administratrix of the depositor's estate sought to recover the money from the beneficiary in New Jersey as a part of the depositor's estate. The Court of Errors and Appeals decided no more than that the so-called tentative trust (which was valid under the law of New York) was governed by the law of New York (the situs of the trust).

v. Tompkins, supra, makes our duty, in such circumstances, equally evident where the question of local law rests on the construction of a State statute by "a high state court of competent jurisdiction".

Indeed, the statute in the present case "calls for no construction", not because it is "clear and unambiguous", but because it has already been construed by "a high State court of competent jurisdiction".

As both reason and authority seem to me to require that we follow the decisions of the Court of Chancery with respect to the New Jersey statute of 1932, c. 40 and 41, I am [fol. 52] compelled to dissent from the action of the majority, which I do respectfully.

A true Copy:
Teste:

—— ——, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 53] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1939

No. 7055

ETHEL ADELAIDE FIELD, Appellant,

vs.

FIDELITY UNION TRUST COMPANY and MINTON H. TWINCH, as Executors of Edith M. Peck, Deceased; and United States Savings Bank of Newark, Appellees

Appeal from the District Court of the United States, for the District of New Jersey

This cause came on to be heard on the transcript of record from the District Court of the United States for the District of New Jersey, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the decree of the said District Court in this cause be, and the same is hereby reversed, with costs, with directions to the said District Court

to enter a decree in conformity with the opinion of this court.

Philadelphia, December 20, 1939.

Francis Biddle, Circuit Judge.

Endorsements: Order Reversing Decree, etc. Received & Filed Dec. 20, 1939. Wm. P. Rowland, Clerk.

[fol. 54] UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, Sct.:

I, Wm. P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Transcript of Record and proceedings in this Court in the case of Ethel Adelaide Field, Appellant, vs. Fidelity Union Trust Co., et al., Executors of Edith M. Peck, Deceased; et al., Appellees, No. 7055, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 13th day of January in the year of our Lord one thousand nine hundred and forty and of the Independence of the United States the one hundred and sixty-fourth.

Wm. P. Rowland, Clerk of the U. S. Circuit Court of Appeals, Third Circuit. (Seal.)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 22, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.